

**United States Department of Labor
Employees' Compensation Appeals Board**

B.D., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Edison, NJ,
Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 15-0400
Issued: May 12, 2016**

Appearances:

*Robert D. Campbell, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2014 appellant, through counsel, filed a timely application for review from a September 18, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP) denying his request for reconsideration. Since more than 180 days elapsed from the most recent merit decision, dated December 4, 2012 to the filing of this appeal, and pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal, counsel argues that OWCP incorrectly framed the underlying issue upon reconsideration and failed to consider medical evidence of injury and disability found in a prior

¹ 5 U.S.C. § 8101 *et seq.*

Board decision. He further argues that it failed to issue a decision within 90 days of appellant's request for reconsideration, prejudicing his appeal rights.

FACTUAL HISTORY

On March 4, 2004 appellant, then a 40-year-old former mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained progressive neck, back, left leg, and hip conditions as a result of unloading trucks at work. This case has previously been before the Board. In a September 13, 2011 decision, the Board found that appellant had not established that he sustained an occupational disease in the performance of duty.² In an order dismissing appeal dated December 20, 2012, the Board found that appellant had not filed an appeal from a final decision of OWCP.³ The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

Appellant requested that OWCP reconsider his claim on July 30, 2012. In support of his request for reconsideration, he submitted a January 16, 2012 report from Dr. David Weiss, a Board-certified orthopedic surgeon, who related that appellant had cumulative and repetitive trauma disorder superimposed upon defined work-related injuries of February 4 and June 17, 2004, as well as occupational low back syndrome, herniated nucleus pulposus at L3-4, L5-S1, aggravation of preexisting age-related osteoarthritis of the lumbar spine, and left lumbar radiculopathy. Dr. Weiss stated that appellant had sustained significant musculoskeletal pathology to his lumbar spine secondary to loading and unloading bulk materials at work from December 2003 through February 2004. He concluded that there was causal relationship between appellant's ongoing spine pathology and his alleged work activities.

OWCP thereafter referred appellant to Dr. Kenneth P. Heist, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated October 25, 2012, Dr. Heist stated appellant's diagnoses as post-traumatic lumbar sprain, and preexisting degenerative joint disease. He explained that on examination appellant had no objective findings related to his occupational disease claim. While appellant had a lumbar sprain caused by his employment, this condition had long since resolved and he was capable of performing his job as a mail handler without restrictions.

By decision dated December 4, 2012, OWCP accepted appellant's claim for a lumbar sprain, noting that it had resolved as of October 8, 2012. On the same date, it terminated appellant's wage-loss compensation benefits. OWCP based its decision on the October 25, 2012 report of Dr. Heist.

A telephone memorandum of May 9, 2013 documents that OWCP left a message for appellant's counsel, noting that appellant had been removed from his employment in February 2004 and that any period of disability would have occurred after his employment was terminated.

² Docket No. 11-247 (issued September 13, 2011).

³ Docket No. 13-183 (issued December 20, 2012).

By appeal request form dated November 29, 2013, received on December 4, 2013, appellant requested reconsideration of OWCP's December 4, 2012 decision terminating his wage-loss benefits. He also submitted several claims for compensation for leave without pay between February 5, 2004 and March 15, 2009.

In a statement dated June 8, 2014, appellant stated that his claim had been unfairly drawn out since February 2004. In an accompanying letter from his attorney dated June 17, 2014, counsel noted that he had filed a request for reconsideration, but that it had not been acted upon within 90 days.

By letter dated September 4, 2014, counsel requested an update as to the status of appellant's request for reconsideration, and noted that a decision had not been rendered within 90 days.

By decision dated September 18, 2014, OWCP denied appellant's request for reconsideration without reviewing the merits of his case.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by it; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁴ Section 10.608(b) of OWCP regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁵

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁶ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁷ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁸

When a reconsideration decision is delayed beyond 90 days, and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. That is, the basis of the original decision and any new evidence should be considered

⁴ 20 C.F.R. § 10.606(b)(3); *D.K.*, 59 ECAB 141, 146 (2007).

⁵ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁶ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁷ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁸ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

and, if there is no basis to change the original decision, an order denying modification (rather than denying the application for review) should be prepared. There is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request.⁹

ANALYSIS

OWCP issued a December 4, 2012 decision terminating wage-loss benefits for appellant's claim. By appeal request form dated November 29, 2013 and received on December 4, 2013, appellant requested reconsideration.

As noted above, the Board does not have jurisdiction over the merits of the December 4, 2012 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of his claim. In his November 29, 2013 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Thus, he is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).

The underlying issue in this case is whether OWCP met its burden of proof to terminate wage-loss compensation benefits for appellant's claim. A claimant may be entitled to a merit review by submitting new and relevant evidence, but appellant has not submitted any new and relevant evidence in this case. With his request, appellant submitted several CA-7 forms claiming wage-loss compensation, a letter from counsel, and a letter from appellant himself supporting wage loss prior to December 4, 2012. These documents, while not previously considered by OWCP, are irrelevant to the underlying issue of OWCP's December 4, 2012 termination of wage-loss compensation benefits, as they address wage loss prior to the date of that decision. As these documents were irrelevant, they are insufficient to require a merit review of his claim.

The Board notes that OWCP has not yet issued a final decision regarding appellant's Form CA-7 claims for wage-loss compensation for periods prior to December 4, 2012. The Board, therefore, does not have jurisdiction to review any specific claims for wage-loss compensation. If a claimant was "terminated due to his physical inability to perform his assigned duties [or] there is evidence that appellant stopped work due to his physical condition," he may still be entitled to compensation for disability even after being terminated for cause, if the medical evidence supports such disability. *See John W. Normand*, 39 ECAB 1381 (1988); *see also Major W. Jefferson*, 47 ECAB 295 (1996).

On appeal, counsel argues that OWCP incorrectly framed the underlying issue relevant to the decision of December 4, 2012. The Board finds that OWCP did in fact frame the underlying issue as to the decision of December 4, 2012 terminating wage-loss compensation benefits. Counsel also argued that OWCP ignored medical evidence of injury addressed in the Board's

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.7(a) (October 2011); *M.D.*, Docket No. 13-1344 (issued November 7, 2013).

decision of September 13, 2011. As this evidence has previously been considered, it does not form a basis for a request for reconsideration of appellant's claim. The matter is *res judicata* and not subject to further review by the Board absent further review by OWCP.¹⁰

Counsel further argues on appeal that OWCP failed to issue a timely decision regarding the request for reconsideration and that this prejudiced appellant's appeal rights. The Board notes that OWCP has a timeliness goal for issuing reconsideration decisions of within 90 days from receipt of the request.¹¹ OWCP procedures provide that when a reconsideration decision is delayed beyond 90 days and the delay jeopardizes the claimant's right to review of the merits of the case by the Board, OWCP should conduct a merit review. However, the procedure manual notes there is no obligation to conduct a merit review on insufficient evidence if the maximum 180-day time limit for requesting review by the Board will have expired within the 90-day period following OWCP's receipt of the claimant's reconsideration request. The Board finds that in this case the 180-day period for appeal expired before appellant's request for reconsideration and that therefore OWCP's delay in issuing the decision on his request for reconsideration did not impact his appeal rights. Counsel's argument on appeal is thus without merit.

The Board accordingly finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or constitute relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ See *R.M.*, Docket No. 14-1213 (October 15, 2014).

¹¹ *Supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2014 is affirmed.¹²

Issued: May 12, 2016
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹² James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.